CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Honorable John L, McClellan, Chairman
Subcommittee on Criminal Laws and Procedures
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to the memorandum of 21 October 1974 from you and Senator Hruska to the Director of Central Intelligence requesting our comments on Committee Print S. 1 Amended of 15 October 1974.

The Central Intelligence Agency has no law enforcement authority and administers no statute which regulates the public or an industry or provides grants or direct benefits to the public. Our interests in criminal law, other than matters of general interest throughout the Government, therefore are few. They are confined essentially to certain provisions of the proposed Subchapter C, "Espionage and Related Offenses" of Chapter 11, and to the substance of what is now section 2511(3) of Title 18 concerning foreign intelligence information and related matters. We are also concerned with the limits on the protection afforded employees outside the United States insofar as crimes of violence against them are within Federal criminal jurisdiction.

Section 1124. There are some problems with respect to the new section 1124 of Title 18, as follows:

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(a) Section 1124 is operative in a practical sense only if there is in existence a Government agency which does not now exist. See subsection (c)(1), clauses (A) and (B). The Interagency Classification Review Committee established under Executive Order 11652 might well fit the requirements of clause (A), but apparently does not fit clause (B), at least as to the information for which there is the greatest need for protection, namely, current and recent information. Under the Executive Order, there is a "review procedure through which the defendant could obtain review" by ICRC "of the lawfulness of the classification of the information," but only as to documents which are at least 10 years old. This means there could be no prosecution if the information is less than 10 years old.

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(b) While many statutes of course do require action by existing Government agencies--for example, the Executive (Cabinet) departments and military departments--or are otherwise based on the existence and operations of a Government agency, to hinge the operation of an important criminal statute on the existence of a Governmental committee which is not a statutory agency and whose members are not Presidential appointees and are not confirmed by the Senate, would seem a precarious and nebulous base for that statute. Thus, ICRC, even with a modified charter, would not be appropriate for inclusion in this bill.

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(c) The Freedom of Information Act Amendments enacted in November would seem to obviate the need for clauses (A) and (B) of subsection (c)(1), in any event. Under those amendments, there now is a procedure, namely, recourse to the courts, by which review of "the lawfulness of the classification of the information" can be obtained. Admittedly, it may be that in due course the amendments will be held unconstitutional.

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(d) We urge the deletion of clauses (A) and (B) and appropriate revision of the remainder of subsection (c). As modified, I believe section 1124 would accomplish some, but not all, of our objectives in proposing criminal legislation for the protection of information relating to intelligence sources and methods.

(e) The negatives prescribed by clauses (A) and (B) of subsection (d)(2) as elements of an affirmative defense seem inappropriate for that purpose since the positives of those matters are not elements of the offense.

Section 1128(b). The definition of "classified information," at subsection 1128(b), appears questionable in concept. The definition is in terms of information which under statute, Executive order or regulation requires a "specific degree of protection against unauthorized disclosure," etc. But in fact, the characteristic of information which warrants its classification is that its disclosure would damage national security. It is only after a determination that disclosure would harm national security that this additional determination

Warner agreed to strike this para., stressing the need for our own legislation.

as to the degree of protection needed can be made. The basic element, in the definition, should be that disclosure would damage national security. We suggest the words "the disclosure of which would cause damage to national security or foreign relations" be substituted for "requiring a specific," etc., on lines 14-16 of page 58.

Subchapter C, Chapter 15. Chapter 15, Subchapter C re-enacts the substance of section 2511 of Title 18 concerning interceptions of communications, but does not re-enact the provisions of that section which leave undisturbed the President's authority to take needed measures to collect foreign intelligence information. It would be highly desirable to modify Subchapter C to do so.

Section 204. Government employees outside the United States are protected by the provisions of section 204 in that it brings within Federal criminal jurisdiction crimes of violence committed against them. But this is so only with respect to Government officials and to a Federal public servant who is "outside the United States for the purpose of performing diplomatic duties or other official duties relating to the functions of an embassy or consular post of the United States." Many U.S. employees assigned abroad, including some assigned for intelligence purposes, probably would not be considered as outside the United States for diplomatic or consular duties. Further, in the case of any employee assigned abroad for intelligence purposes but ostensibly assigned for diplomatic or consular duties, there might be special problems. We suggest that subsection 204(a)(2) be revised as follows: "A Federal public servant outside the United States for the purpose of performing official duties of the United States."

Since provisions concerning sentencing and culpability involve the matter of consistency throughout the new Code, we have no suggestions in these areas.

It may be that we will want to comment further at a later legislative stage. I am grateful for the opportunity to comment at this stage, while the bill is being prepared for introduction.

Sincerely,

Warren agreed to add a paragraph

W. E. Colby
Director

cc: Honorable Roman L. Hruska
W. Vincent Rakestraw, Esq.
Assistant Attorney General